IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2018] NZERA Christchurch 17
3024052

	BETWEEN	KAIKORAI SERVICE CENTRE LIMITED Applicant
	AND	FIRST UNION INCORPORATED Respondent

Member of Authority:	Helen Doyle
Representatives:	Penny Swarbrick and Tim Oldfield, Counsel for Applicant Peter Cranney, Counsel for Respondent
Submissions received:	8 February 2018 from Applicant 9 February 2018 from Respondent
Determination:	12 February 2018

DETERMINATION OF
APPLICATION FOR REMOVAL TO THE EMPLOYMENT COURT

A **The matter in file number 3024071 is removed in its entirety to the Employment Court.**

B **Costs are reserved.**

Employment Relationship Problem

[1] The applicant is a duly incorporated company and carries on business as a Pak N Save supermarket in Invercargill.

[2] The applicant seeks removal to the Employment Court of a matter lodged with the Employment Relations Authority under file number 3024071. It relies in doing so on the ground set out in s 178(2)(c) of the Employment Relations Act 2000 ("the Act") that the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues.

[3] The respondent is a registered union under the Act. It opposes the application for removal on the basis that the matter under file number 3024071 does not involve the same or similar issues to those before the Employment Court. Further that removal would unjustly deprive the respondent of a challenge right and that the applicant should have fairly and in good faith advanced the claim earlier to be resolved with the respondent's claim.

[4] It was agreed with Counsel that the matter would be determined on the papers following receipt of submissions with urgency because of a case management conference to be held in the matter before the Employment Court on 13 February 2018 and the desirability of having a determination by that time.

The application before the Authority under file number 3024071

[5] The applicant and the respondent are parties to collective bargaining. The applicant seeks a determination that the respondent breached the duty of good faith in collective bargaining.

The challenge before the Employment Court

[6] The applicant has challenged a determination of the Authority on a non de novo basis.[1] The respondent applied to the Authority to fix the terms of a collective agreement under s 50J of the Act. The Authority found that the ground in s 50J (3)(a) of the Act was made out that there was a breach of the duty of good faith in collective bargaining and that the breach was sufficiently serious and sustained as to significantly undermine the bargaining. It did not find the other grounds to be made out.

[7] The challenge has been assigned file number EmpC 339/2017.

The applicant's submissions

[8] Ms Swarbrick submits that the Court already has before it proceedings which are between the same parties and involve similar or related issues.

[9] She accepts that the issues are not the same but they are similar or related because the applicant alleges the respondent breached the duty of good faith in collective bargaining and the respondent alleges the applicant breached the duty of good faith in collective bargaining. Further that the collective bargaining giving rise to the allegation is the same. The applicant submits the statutory test under s 178(2) (c) of the Act is met.

[10] Ms Swarbrick submits that the discretion to remove or not to the Court should be exercised in favour of the applicant to avoid separate proceedings and not waste the Authority and Court's resources. Further that if separate proceedings were heard the parties would incur additional costs and there is a risk of overlapping and potentially conflicting factual findings in each proceeding if the matter is not removed. It is preferable, Ms Swarbrick submits, that all of the relevant evidence be heard by one fact finder and the Court already has proceedings involving the same parties and similar or related issues and it is the superior court.

---

[1] *First Union Inc. v Kaikorai Service Centre Limited* [2017] NZERA Christchurch 200

[11] Ms Swarbrick submits that the allegations made by the applicant will directly impact on the proceedings before the Court because it will be argued that the conduct of a party making an application under s 50J of the Act is relevant in determining whether the breach of good faith alleged by the party significantly undermined the bargaining. Further that the Court may still direct the Authority to investigate the matter if incorrectly removed under s 178 (5) of the Act.

[12] Ms Swarbrick refers the Authority to the Employment Court statement in *Randwick Meat Co Ltd v Burns* [2]

> It appears to me that, once it is established that the proceedings are between the same parties, the test envisages a more holistic consideration of the relevant issues. In this regard, I agree with the approach adopted by the Authority when it stated that the issues to be determined in the matters already before the Court are "an intrinsic part of the factual matrix pertinent to the dismissal claim". In other words, although the relevant issues in the three sets of proceedings are not identical, they are between the same parties and they are sufficiently similar or related to justify removal.

The respondent's submissions

[13] Mr Cranney submits the matter before the Court is a non de novo challenge to a determination of the Authority and as required by s 179 (4) of the Act the applicant in its statement of claim has identified the errors of law, questions of law or fact the employer wants to see resolved and the grounds on which the election is made. He submits that the statement of claim addressed issues and sought remedies about matters not before the Authority and the respondent objected in its statement of defence. He submits the application before the Authority is an attempt by the applicant to answer the pleading objections and jurisdictional problems and that it would be unlikely even if removal is ordered that the proceeding could be heard with the non de novo challenge.

---

[2] *Randwick Meat Co Ltd v Burns* [2015] NZEmpC 188 at 27

[14] While Mr Cranney in his submissions accepts that the parties are the same he does not accept that the issues in the application before the Authority are the same or similar to those before the Court. He submits that the matter before the Court is an ongoing refusal to recognise the union and bargain with it about wages.

[15] He submits that the applicant's application is that the union used immoderate words on one occasion and conducted a picket on another and that it does not involve the same or similar issues to those before the Court because the challenge is a non de novo challenge and determinations made for the purposes of s 50J are immune from challenge in the Court except as to whether one or more of the grounds in s50J (3) are met – s 179(2) of the Act.

[16] Mr Cranney submits that the challenge is to the Authority's conclusion that s 50J (3) (a) was met as the employer had "refused to bargain collectively in good faith with First Union about wages"; and "failed to recognise the individual choice the members of first union made to bargain collectively for a fundamental element of their employment relationship"; and "failed to recognise that First Union was entitled to represent its members in relation to their collective interest as employees by collectively bargaining wages".[3] That is the only issue and it is not the same or similar to the application before the Authority and that it would not be just for the applicant to have direct access to the Court and deprive the respondent of a right of challenge.

[17] Mr Cranney submits that the issues now raised are related but only in a loose and tenuous sense and do not meet the statutory test which is whether there is sufficient relatedness to justify removal. He distinguished in his submission *Randwick Meat Co Ltd v Burns*[4] because the issues in the two sets of proceedings were sufficiently similar or related to justify removal and he submits that the issue having now been raised should be resolved in the normal way and "not clipped on to a non de novo Court proceeding".

Discussion and analysis

[3] [58] at n. 1 above
[4] *Above* n 2

[18] There are proceedings before the Employment Court involving the applicant and respondent.

[19] The respondent does not accept that the statutory test for removal to the Employment Court in s 178(2)(c) of the Act is satisfied on the basis that the proceedings whilst involving the same parties do not involve the same or similar or related issues to justify removal.

[20] I accept that the issues are not the same and the focus should properly fall on whether they are similar or related issues to justify removal.

[21] Mr Cranney submits that it is not enough to say that the issues are similar because they occurred during the same collective bargaining. Putting aside for the moment the nature of the challenge the common issues in both the challenge and the application before the Authority can be broadly put as good faith in collective bargaining that took place between the parties in late 2015/2016.

[22] The then Chief Judge Colgan in *Flight Attendants and Related Services (NZ) Associations Inc v Air New Zealand and others*[5] considered the ground under s 178 (2) (c) of the Act on an application for special leave. He discerned the statutory purpose of s 178 (2) (c) of the Act to be that issues between the same parties which are the same or similar or related, should be dealt with expeditiously in one venue and at one time. He referred in the context of the particular case to the undesirability of the Court hearing and deciding the lock out issues and at the same time, before or after the Authority dealing with the good faith elements of the same dispute.

[23] The factual matrix that will be considered as a result of the challenge will include some aspects of the application before the Authority although I accept not all. I accept that the issue about the inflatable rat raises a different legal matter and factual context than the issue with the challenge. There will therefore be some overlap but not a complete overlap as

---

[5] *Flight Attendants and Related Services (NZ) Association Inc v Air New Zealand Ltd and others* [2013] NZEmpC 125 at [42]

to the evidence/agreed facts before the Court about the challenge. As Judge Ford said in *Randwick* [6] the test for removal does not necessarily involve an issue by issue analysis as to what evidentiary matter in the respective proceeding may or may not overlap or whether certain matters can be dealt with separately. The focus Judge Ford stated was more holistic when it comes to relevant issues and whether, if not the same, they are sufficiently similar or related to justify removal. I accept Mr Cranney's submission that *Randwick* involved different grievance issues but the principles form that judgement can be applied in this case.

[24] I do weigh Ms Swarbrick's submission that it will be argued before the Court that the conduct of a party making an application under s 50J of the Act is relevant in determining whether the breach of good faith alleged significantly undermined the bargaining.

[25] I find standing back and viewing the matter as a whole that the issues of good faith that arise from the same bargaining between the parties are sufficiently similar and/or at least sufficiently related to justify removal.

Discretionary factors – s 178 (2)(d) of the Act

[26] I have considered, but am not persuaded, that the non de novo challenge should weigh against removal. I accept Ms Swarbrick's submission that the Court may under s 178 (5) of the Act, if it considers the matter was not properly removed, order the Authority to investigate it. At this stage it is unclear what could happen. The Authority cannot speculate about that. It is a matter for the Employment Court. It is enough at this stage to note s 178 (5) of the Act.

[27] It is a significant matter to deprive the respondent of a further level of challenge. I accept Mr Cranney has set out concerns with the timing of the application and unfairness that it is dealt in what he sees as a "clip on" to the challenge. Against that it is desirable where it has been found that the issues are sufficiently similar and/or sufficiently related to justify removal that they are dealt with at the same time by the same decision maker so that all the issues can be addressed in a logical and cost effective manner.

---

[6] Above n 2 at [27]

[28] I do not find there are discretionary factors against removal.

Determination

[29] I remove file number 3024071 to the Employment Court for hearing and determination in its entirety.

Costs

[30] I reserve the issue of costs which will no doubt be dealt with by the Employment Court in due course.

Helen Doyle
Member of the Employment Relations Authority